STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT THOMAS CROUCHMAN
And SUSAN CROUCHMAN, his wife,

Plaintiff-Appellant,

No. 127871

vs

MOTOR CITY ELECTRIC COMPANY,
A Michigan corporation, and
CITIZENS INSURANCE COMPANY OF AMERICA,
A Michigan corporation,
Defendants

Court of Appeals
No. 248419

Wayne Circuit Court
No. 01-112063-NI

and

KEVIN JAMES WIECZOREK,
Defendant, Third Party Plaintiff-Appellee

v

AUTO-OWNERS INSURANCE COMPANY,
Correctly identified as
HOME-OWNERS INSURANCE COMPANY,
Third Party Defendant Appellant

127871

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BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

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ORDER APPEALED FROM

Third Part Defendant Appellant Auto Owners Insurance Company, also known as Home-Owners Insurance Company, seeks leave to appeal from the decision of the Court of Appeals entered October 28, 2004 (exhibit A). Reconsideration was denied December 13, 2004.

QUESTION PRESENTED FOR REVIEW

I. HAS APPELLANT INSURER STATED GROUNDS FOR THE GRANTING OF LEAVE TO APPEAL WHERE THE ONLY ISSUE IS THE INTERPRETATION OF AN INSURANCE POLICY UNDER ACCEPTED PRINCIPLES OF INTERPRETATION?

Appellant insurer says: Yes

Appellee insured says: No

The trial court did not address this question

The Court of Appeals did not address this question

II. IS THE NAMED INSURED UNDER A PERSONAL AUTOMOBILE POLICY INSURED AGAINST LIABILITY WHEN USING WITH PERMISSION A VEHICLE OWNED BY THE INSURED'S EMPLOYER AND REGULARLY MADE AVAILABLE TO THE INSURED?

Appellant insurer says: No

Appellee insured says: Yes

The trial court said: Yes

The Court of Appeals said: Yes

INDEX OF AUTHORITIES

MATERIAL PROCEEDINGS AND FACTS

Accident Facts

This case involves issues of coverage under an insurance policy. The issues arise out of a motor vehicle accident on April 10, 2001. Robert Crouchman alleged that Defendant-Appellee Kevin Wieczorek drove negligently and rear-ended him. Mr. Wieczorek was driving a vehicle that was owned by his employer, Motor City Electric.

Insurance Policies

Mr. Wieczorek was insured under a personal policy issued by Home-Owners (exhibit D, policy). Mr. Wieczorek's employer, Motor City Electric, was insured by Reliance Insurance Company. Reliance became insolvent. Under the Michigan Property & Casualty Guaranty Act, MCL 500.7931, the role of the Michigan Property & Casualty Guaranty Association is that of an insurer of last resort.

Mr. Wieczorek, by a third-party action, sought a declaration that he was insured under his personal automobile policy issued by Home-Owners.

Home-Owners Coverage Extension

Section IV of the Home-Owners policy contains extensions of coverage.

SECTION IV – INDIVIDUAL NAMED INSURED

If the first named insured in the Declarations is an individual and the automobile described in the Declarations is a private passenger automobile the following extensions of coverage apply:

1. LIABILITY COVERAGE – BODILY INJURY AND PROPERTY DAMAGE

   a. The Liability Coverage provided for your automobile (that is not a trailer) also applies to an automobile (that is not a trailer) not:

      (1) owned by or furnished or available for regular use to you . . .

* * *

b. We extend this coverage only:

(1) to you;

* * *

c. We do not cover:

(1) the owner of the automobile (that is not a trailer).

(2) an automobile used in your business or occupation or that of a relative, unless it is:

(a) a private passenger automobile; and

(b) used by you . . ..

(Exhibit E[1], exhibit D, p 11)

Trial Court Motions

Third Party Plaintiff Wieczorek and Third Party Defendant Home-Owners filed cross motions for summary disposition. The hearing was held on January 3, 2003 (exhibit C). The trial court took the matter under advisement and issued a letter opinion on January 13, 2003, holding that Home-Owners extension of coverage in Section IV applied to Mr. Wieczorek's use of his employer's vehicle (exhibit B).

Court of Appeals Affirmance

Home-Owners appealed as of right and the Court of Appeals affirmed (exhibit A, opinion). Home-Owners filed a timely motion for reconsideration, which was denied, and now files an application for leave to appeal to this Court.

[1] For convenience of reference, Section IV is included as a separate exhibit as well as in exhibit D.

ARGUMENT

I. THIS CASE INVOLVES NO MAJOR ISSUES; IT IS A SIMPLE MATTER OF THE INTERPRETATION OF AN INSURANCE POLICY.

This case does not meet any of the grounds for appeal stated in MCR 7.302(B). The issue here is a simple matter of the interpretation of an insurance policy under accepted criteria. This case does not implicate "the validity of a legislative act," nor does it raise a matter of "significant public interest" and involve the state or a state agency or officer. Neither does this case involve any "legal principles of major significance to the state's jurisprudence."

This case involves only the interpretation of a clause of an insurance policy, under the established rules of construction.

II. THE EXTENSION OF COVERAGE PORTION OF THE POLICY EXTENDS COVERAGE TO ANY VEHICLE THAT IS NOT OWNED BY THE INSURED IF IT IS USED IN HIS OCCUPATION.

Standard of Review. The construction of an insurance policy is a question of law and is reviewed de novo. *Henderson v State Farm Fire & Casualty Co,* 460 Mich 348, 353; 596 NW2d 190 (1999). A trial court's grant or denial of summary disposition is reviewed de novo. *Oakland County Treasurer v The Title Office, Inc,* 245 Mich App 196, 200; 627 NW2d 317 (2001).

Mr. Wieczorek's employer, Motor City Electric, was insured by Reliance Insurance Company, but Reliance became insolvent as of October 3, 2001. Under the Michigan Property & Casualty Guaranty Act, MCL 500.7931, the Michigan Property & Casualty Guaranty Association was established to pay certain "covered claims." It is a payor of last resort. It is liable "only if there is no other insurer to turn to for coverage." *Auto Club Insurance Association v Meridian Mutual Insurance Co,* 207 Mich App 37, 39-41; 523 NW2d 821 (1994).

As the Court of Appeals noted, the facts of this case are not disputed.

1. Mr. Wieczorek was a named insured under the Homeowner policy at issue (exhibit D, declaration page).

2. The vehicle that Mr. Wieczorek was driving, a 2000 Ford Excursion, was a "private passenger automobile" as defined in the policy.

3. The Ford Excursion, owned by his employer, was regularly available for Mr. Wieczorek's use.

4. Mr. Wieczorek was driving in the scope of his employment and was therefore using the vehicle in his occupation.

The parties also do not dispute which policy provision applies. It is section IV of the policy (exhibit E), which, by its terms creates "extensions of coverage."

SECTION IV – INDIVIDUAL NAMED INSURED

If the first named insured in the Declarations is an individual and the automobile described in the Declarations is a private passenger automobile the following extensions of coverage apply:

1. LIABILITY COVERAGE – BODILY INJURY AND PROPERTY DAMAGE

a. The Liability Coverage provided for your automobile (that is not a trailer) also applies to an automobile (that is not a trailer) not:

(1) owned by or furnished or available for regular use to you . . .

* * *

b. We extend this coverage only:

(1) to you;

* * *

c. We do not cover:

(1) the owner of the automobile (that is not a trailer).

(2) an automobile used in your business or occupation or that of a relative, unless it is:

(a) a private passenger automobile; and

(b) used by you . . ..

(Exhibit E)

The policy defines "private passenger automobile" as:

7. Private passenger automobile means:

a. a passenger or station wagon type automobile with four or more wheels;

b. pickup or van type automobile with a gross vehicle weight of 15,000 pounds or less which is not used in the business of carrying passengers for hire.

(Exhibit D, p 1)

The criteria that guide the interpretation of an insurance contract are summarized in *Arco Industries v American Motorists Insurance,* 448 Mich 395; 531 NW2d 168 (1995). "[W]e must look to the language of the insurance policy and interpret the terms in accordance with the well-established Michigan principles of construction" (*id.* at 402). "First, an insurance policy must be enforced in accordance with its terms" (*id.*). "We will not hold an insurance company liable for a risk it did not assume" (*id.*). "Second, we cannot create an ambiguity where the terms of the contract are clear" (*id.*). "Where there is no ambiguity, we will enforce the contract as written" (*id.* at 403). "However, where an ambiguity exists, this Court will construe the policy in favor of the insured" (*id.*).

Mr. Wieczorek is the named insured under the Home-Owners policy at issue here, and claims coverage for his alleged liability in the accident at issue. Applying the criteria described above to the language of Appellant Home-Owners' policy compels the conclusion that Appellee Wieczorek is insured under his auto policy. As was held by the trial court and the Court of Appeals, the language either unambiguously extends coverage to Appellee in Section IV or the language in Section IV on which Appellant relies creates an ambiguity.

A. THE COVERAGE EXTENDS TO ANY PRIVATE PASSENGER AUTOMOBILE THAT THE NAMED INSURED IS USING IN HIS OCCUPATION.

1. SUBSECTION 1(C) OPERATES INDEPENDENTLY TO EXTEND COVERAGE.

Section IV extends coverage for liability in subsection 1. Subsection 1 has three separate parts, a through c. Subsection c itself extends coverage to the vehicle that Mr. Wieczorek was driving. Subsection c states:

> c. We do not cover:
>
> (1) the owner of the automobile (that is not a trailer).
>
> (2) **an automobile used in your business or occupation** or that of a relative, **unless it is**:
>
> (a) **a private passenger automobile**; and
>
> (b) **used by you** . . ..

(Exhibit E, emphasis added.)

As Judge Giovan noted:

> The clear implication of the phrase "unless it is: (a) a private passenger automobile; and used by you . . .," is that liability coverage is afforded if the vehicle used in the business happens to be a private passenger automobile. Or, to put it another way, the vehicles excluded from coverage when used in one's business are all automobiles other than private passenger automobiles.
> (Exhibit B, p 1)

As a matter of simple logic, the only permissible inference from the statement that there is no coverage if the vehicle is **not** a private passenger automobile used by the named insured is that if those criteria are met, then there is coverage. Any other interpretation would treat the language as having no meaning.

> Just as "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," *State Farm & Casualty Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715(2002), courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.

Klapp v United Insurance Group Agency, Inc, 468 Mich 459, 468; 663 NW2d 447 (2003).

If Home-Owners had intended, as it now claims, that subsection c is subordinate to subsection a, it would have been easy to say so, by beginning subsection c with language such as "The extension of coverage in subsection **a** above does not include . . .." But Home-Owners chose different language, leading to a different result and cannot now avoid the implications of the language it chose.

If Home-Owners had intended not to provide liability coverage when its insured was driving a passenger vehicle in his occupation, it would have been easy to say that, much easier than it is to make the convoluted argument that Home-Owners now makes. Paragraph **c(2)** would have been written – as **c(1)** was – as an unconditional exclusion. It would have said simply:

> c. We do not cover:
>
> (2) an automobile used in your business or occupation.

But that was not the intent, because subsection **1.c(1)** goes on to exclude "an automobile used in your business or occupation" that is "a private passenger automobile" that is "used by you."

2. SUBSECTION 1(C) DISTINGUISHES BETWEEN COVERAGE FOR THE OWNER OF THE NON-OWNED VEHICLE AND COVERAGE FOR THE NAMED INSURED.

The internal structure of subsection **c** confirms that it is a separate and distinct extension of coverage. It has three parts. Part 1 refers to the person who owns the non-owned vehicle. Part 2 refers to the named insured. Part 3 refers to a relative. No relatives are at issue, so looking at the first two, there is a clear bifurcation. The person who owns the "non-owned" (*i.e.,* not owned by the named insured) vehicle is not insured.

That is the unavoidable conclusion from the straightforward language of part 1:

> c. We do not cover:
>
> (1) the owner of the automobile . . .

But part 2 takes a different approach to the named insured, identified as "you."

> c. We do not cover:
>
> (2) an automobile used in your business or occupation or that of a relative, **unless it is**:
>
> (a) **a private passenger automobile**; and
>
> (b) **used by you** . . ..

Home-Owners structured subsection **c** in this way, with a clear separation and a clearly different treatment of two different persons. For the person who owns the non-owned vehicle, the statement is absolute – no coverage. For the named insured, the statement is contingent – no coverage **unless** certain criteria are met, but coverage if they are met.

3. SUBSECTION 1(C) DISTINGUISHES BETWEEN COVERAGE FOR "THE AUTOMOBILE" AND COVERAGE FOR "AN AUTOMOBILE."

It is not just the structure of subsection **c** that leads to the conclusion that there is coverage. The language that Home-Owners chose compels the same result. This follows from Home-Owners' use of the definite article and then the indefinite article.

> c. We do not cover:
>
> (1) the owner of **the automobile** (that is not a trailer).
>
> (2) **an automobile** used in your business or occupation or that of a relative, unless it is:
>
> (a) a private passenger automobile; and
>
> (b) used by you . . ..

(Exhibit E, emphasis added.)

The term "the automobile" in **c(1)** may be a reference to subsection **a** ("not (1) owned by . . . you"), because that subsection defines automobiles that meet certain criteria. But while the phrase "the automobile" may be a reference to the vehicle described at the beginning of the extension, the reference to "**an** automobile" in **c(2) cannot** be. The distinction chosen by Home-Owners when it wrote this part of the policy was between a **particular** vehicle ("the automobile") and **any** vehicle ("an automobile").

The language of coverage extension IV.1.c draws this distinction between "the automobile" as it relates to coverage of the owner, and "an automobile" as it relates to coverage of the named insured, Mr. Wieczorek. This distinction is not only compelled by the plain words of subsection c, but is also a logical and common sense distinction. The owner of "**the** [i.e., non-owned] automobile" should not be covered for liability by Mr. Wieczorek's policy. But Mr. Wieczorek should be covered for his use of "an [i.e., any] automobile" he uses in his occupation.

This court has recognized the different effect of the definite and indefinite articles in *Allstate Insurance Co v Freeman,* 432 Mich 656; 443 NW2d 734 (1989), where the issue was the application of the intentional act exclusion. The exclusion was framed in terms of the intentional act of "an insured," as opposed to "the insured." Citing the analysis of *Allstate Insurance Co v Gilbert,* 852 F2d 449 (CA 9, 1988), this Court held that coverage was excluded for all insureds if the loss resulted from the intentional act of any insured.

> We adopt the analysis of the *Gilbert* court and hold "that by excluding insurance coverage for injury or damage intentionally caused by 'an insured person,' Allstate unambiguously excluded coverage for damages caused by the intentional wrongful act of *any* insured under the policies.' *Gilbert, supra* at 454 (citations omitted).
> *Allstate v Freeman,* 432 Mich at 694-695 (emphasis by the court).

For the same reason, the distinction Home-Owners draws in subsection **c** between "the automobile" and "an automobile" must be given effect here. Assuming that "the automobile" in

c(1) is a reference to the automobile that is identified in subsection **a**, it follows that the reference to "an automobile" in **c(2)** is a reference to "**any** [automobile]" that is a private passenger automobile used by the named insured in his occupation.

Thus, Home-Owners' argument conflicts with the structure of the entire liability coverage extension in Section IV, the structure within subsection IV.1.c itself, and the text of subsection IV.1.c. The structure of Section IV's liability coverage extension is that it has three co-equal parts, none of which is made subordinate to any other, and each of which therefore operates independently. The structure within subsection **c**, and its parts (1) and (2), is a bifurcation into "the owner of the automobile" and "an automobile used in [the insured's] . . . occupation." Finally, the text of subsection **c** reflects a distinction, chosen by Home-Owners, between "the automobile" [c(1)] and "an automobile" [c(2)].

B. THE COVERAGE EXTENSION FOR A NON-OWNED AUTOMOBILE CREATES COVERAGE FOR THE NON-OWNED AUTOMOBILE MR. WIECZOREK WAS DRIVING.

The first part of Section IV's extension of coverage states.

> a. The Liability Coverage provided for your automobile (that is not a trailer) also applies to an automobile (that is not a trailer) not:
>
> (1) owned by or furnished or available for regular use to you . . .

Here, Home-Owners offers an argument that is intricate and detailed, but the length and intricacy of the argument emphasize the argument's weakness. Leaving out the reference to a trailer, which is not relevant here, what the actual language says is:

> (a) The Liability Coverage provided for your automobile also applies to an automobile not
>
> (1) owned by or furnished or available for regular use to you . . ..

Home-Owners argues that this language actually means:

> (a) "The Liability Coverage provided for your automobile also applies to an automobile *you do not own but which is*"
>
> (1) furnished or available for regular use to you.

Nothing could have been easier to say than this, if this is what Home-Owners actually intended. Comparing this straightforward language to the language Home-Owners actually chose demonstrates the gap between what Home-Owners actually said and what it now claims it meant.

Home-Owners chose different language from the simple language that would have accomplished the purpose it claims it had, and that different language leads to a different result. As Home-Owners wrote the clause, it describes three distinct classes of automobiles to which "[t]he Liability Coverage for your automobile also applies . . .." These three classes of vehicles are demarcated by the disjunctive "or."

As with subsection **c**, the structure of IV.1.a contributes to the meaning. The phrase "an automobile not" is separated from the three distinct characteristics which appear after the "(1)." Those three characteristics, in turn, are set apart from each other by the disjunctive "or," giving each a separate status. The effect is to define three classes of vehicles, each of which is a class of vehicle to which coverage is extended. The three classes are:

1. an automobile not owned by you
2. an automobile not furnished for regular use by you
3. an automobile not available for regular use by you.

It is not disputed that the accident vehicle does not fit within classification 2 or 3, but does fit within classification 1.

Home-Owners argues that this paragraph actually extends coverage only to a vehicle that meets all three of the negative requirements. This ignores the fact that "or" is disjunctive, while Home-Owners' argument requires treating "or" as conjunctive in each of its appearances, as the Court of Appeals noted (exhibit A, p 3). It is for this reason that the Court of Appeals described this interpretation as "artful" (*id.*).

Appellant relies upon this Court's decision in *Farm Bureau v Nikkel,* 460 Mich 558; 596 NW2d 915 (1999). Appellant argues that the language is parallel. There are three critical differences between the policy language at issue in *Nikkel* and the policy language at issue here. First, in *Nikkel* the language was in a definition section and was therefore inherent in the basic coverage grant. Here, the language is in a section that explicitly contains "extensions of coverage."

The clause in Home-Owners' policy is also different because the separation of "an automobile not" from the three characteristics creates a different relationship, under which "an automobile" is linked separately to each of the three characteristics. Thus, it extends coverage to three classes of automobiles: automobiles "not owned by you," automobiles "not furnished to you," and automobiles "not available to you."

Finally, unlike *Nikkel*, here there is subsection **c,** which contains a separate basis for coverage, as in explained above, based on the distinction between "the automobile" and "an automobile," extending coverage for "an automobile" used in the named insured's occupation that is a "private passenger automobile . . . used by you."

Home-Owner argues that this interpretation extends coverage to all non-owned vehicles used by the named insured. This is incorrect. For example, if a friend or relative of the named insured regularly allows the named insured to use the friend relative's vehicle, this policy does not apply. There is no global coverage for all vehicles the insured uses but does not own. There is a

focused extension that included the named insured's employer's vehicles when made available to the named insured. If Home-Owners thinks that narrow extension is nonetheless too broad, the solution is to write policy language that does not extend coverage in that way.

Another argument offered by Home-Owners is similarly off the mark. At page xiv, Home-Owners asks the rhetorical question, why any employee would "encourage her employer to insure its vehicles?" Encouragement is hardly necessary. Statutory requirements aside, an employer will have more than enough incentive to protect itself by its own policy. A particular employee may not have his or her own policy, or may have liability limits too low to protect a business.

Home-Owners notwithstanding, subsections **a** and **c** establish a simple and sensible area of coverage. The insured's own vehicle or an employer's passenger vehicle are covered. If a friend made a vehicle regularly available to the insured, the coverage would not apply, but the relationship to the insured's employer is different, as it relates to passenger vehicles. The use of a "company car" is a common perquisite of employment and the company car often serves as a second vehicle for an insured. This is a situation for which an insured would normally expect to have, and an insurer would normally expect to extend, coverage. The language of the policy was written to include that situation.

C. IF THERE IS AN AMBIGUITY, COVERAGE APPLIES.

The principle that "where an ambiguity exists, this Court will construe the policy in favor of the insured" (*Arco, supra*) need not be applied, because there are two separate bases for extending coverage. Each stands alone and either is sufficient. But, as Judge Giovan observed, "[t]he very best that one can say is that the language is ambiguous" (exhibit B, p 2).

For example, and looking only at subsection IV.1.a, even if we grant that Home-Owners' interpretation – converting "or" to "and" – is permissible, it is certainly no more so than leaving the

two disjunctives "or" undisturbed in their meaning. This is especially so in light of the structure of IV.1.a, with the phrase "an automobile not" separated from the three disjunctive classifications of "owned," "furnished," and "available."

The same is true of subsection IV.1.c. Home-Owners' argument requires that "the automobile" be treated as identical to "an automobile." Even if we ignore the precept of the *Freeman* case on the distinction between the definite and the indefinite article, there is at best no reason to prefer ignoring the lexical difference (Home-Owners' position) as opposed to respecting it.

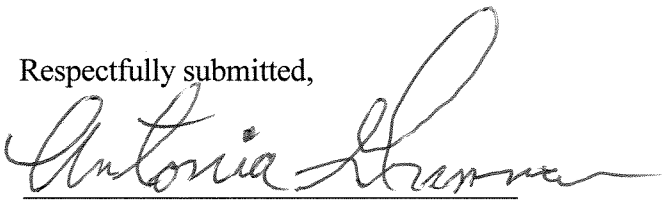
Taking the two subsections together presents an even stronger argument. Even if Home-Owners' interpretation of IV.1.a were plausible, and even if it were sufficiently plausible to be considered more likely than the straightforward interpretation applied by the lower courts, it would still confront the separate language of IV.1.c, which stands apart. The only way to link the first part of IV.1.**c** to IV.1.**a** is that the phrase "the automobile" in IV.1.c(1) means "the automobile described in IV.1.a." But making that link requires giving credit to the fact that IV.1.a(1) uses the definite article, and if that is done, then the difference between "**the** automobile" and "**an** automobile" must also be respected.

On the one hand are Appellee's analyses, each of which is grounded on the ordinary meanings of the words in the coverage extension. On the other hand are Home-Owners' arguments, each of which requires that critical terms be assigned meanings opposite to those found in a dictionary. But even that is not enough, because once the meanings start shifting in one subsection, the conflict with the other subsection becomes irreconcilable.

RELIEF REQUESTED

Appellee requests that this Court deny leave to appeal.

Respectfully submitted,



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February 18, 2005

Crouchman\Sct-aal

STATE OF MICHIGAN
IN THE SUPREME COURT

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

Patricia M. Murphy states that on February 18, 2005, she served a true and correct copy of **Appellee's Brief in Opposition to Application for Leave to Appeal, Exhibits, and Proof of Service,** upon:

John A. Yeager and Matthew K. Payok, WILLINGHAM & COTÉ, P.C., Attorneys for Appellant, 333 Albert Street, Suite 500, East Lansing, MI 48823

by depositing it in a mail receptacle of the United States Postal Service, enclosed in a sealed envelope plainly addressed as indicated above, with postage thereon fully prepaid.

I declare under penalty of perjury that the statements above are true to the best of my information, knowledge and belief.

Patricia M. Murphy